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Kamal Corp., Jaber Food Corp., Coro Food Corp., Loreen Food Corp., Nadine Food Corp., Crescent Food Corp., Ziad Food Corp., 89–02 Food Corp., 75–07 Food Corp., and 130–10 Food Corp., d/b/a Trade Fair Supermarkets and Local 338, Retail, Wholesale and Department Store Union/United Food and Commercial Workers. Case 29–CA–28448

# April 30, 2009 DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On September 23, 2008, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed a brief in support of the judge's decision; and the Charging Party Union filed a brief in support of the judge's decision and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.<sup>1</sup>

#### Introduction

The complaint in this case alleged that the Respondent violated the Act by discriminating against employees who were not union members. The charge underlying the complaint, however, alleged the reverse—that the Respondent discriminated against union supporters. The judge found that although the charge does not support the complaint, the complaint was nonetheless valid. As explained below, we agree with the judge that the complaint allegations are not closely related to the charge allegations, but we also find merit in the Respondent's contention that the complaint should be dismissed on this basis.

# Facts and Judge's Decision

The Respondent operates 10 supermarkets in Queens, New York. For at least 20 years, the Union has represented the Respondent's employees in a multi-store bargaining unit, and the parties have negotiated successive collective-bargaining agreements.<sup>2</sup> Since at least 2000, the Respondent applied the collective-bargaining agreement to employees who were union members but not to employees who were not union members, paying the nonmembers lower wages and benefits.

On August 15, 2007, the Union filed an unfair labor practice charge alleging that the Respondent violated Section 8(a)(3) of the Act by retaliating against employees for engaging in union activity.<sup>3</sup> Thereafter, the General Counsel issued a complaint alleging that the Respondent violated Section 8(a)(3) by failing to apply the collective-bargaining agreement to the nonmembers.<sup>4</sup>

Before the judge, the Respondent challenged the validity of the complaint. Specifically, the Respondent argued that the complaint was barred by Section 10(b)'s 6-month statute of limitations, and that it was not closely related to the charge. The Respondent also challenged the unfair labor practice allegation on the merits, contending that the nonmembers were employees of an employee leasing company, not the Respondent.

The judge rejected the Respondent's challenges to the validity of the complaint. First, he found that the complaint was not barred by Section 10(b)'s 6-month statute of limitations. Next, he found that although the complaint was not closely related to the charge, the complaint was nonetheless valid because of his "main finding" that "Section 10(b) does not apply to this case." Addressing the merits of the complaint allegation, the judge found that the nonmembers were employees of the Respondent and, accordingly, the failure to apply the collective-bargaining agreement to the nonmembers violated Section 8(a)(3).

<sup>&</sup>lt;sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>&</sup>lt;sup>2</sup> The most recent collective-bargaining agreement was due to expire on October 4, 2006. Negotiations for a new agreement continued through at least March 2007 and no agreement had been reached at the time of the April 2008 hearing. The record is unclear as to whether the parties extended the expiring agreement pending negotiations.

<sup>&</sup>lt;sup>3</sup> The charge also alleged that the Respondent violated Sec. 8(a)(5) by failing to maintain terms and conditions of employment upon expiration of the collective-bargaining agreement. On December 5, 2007, the Union filed an amended charge that reiterated the 8(a)(3) allegation but did not include the 8(a)(5) allegation. Although the August 15 charge and the December 5 amended charge did not allege any specific acts of 8(a)(3) retaliation, the Union filed additional charges in other cases (on December 5 and 12) alleging specific unlawful responses to employees' union activities, including a constructive discharge, transfers, denying holiday pay, changing work schedules, modifying break periods, interrogations, threats to reduce pay or hours, threats of unspecified reprisals, and telling employees their hours had been reduced or they had been transferred because of their union activities.

<sup>&</sup>lt;sup>4</sup> The complaint alleged additional allegations that were resolved during the hearing by settlement agreements approved by the judge.

Before the Board, the Respondent contends, among other things, that although the judge correctly found the complaint is not closely related to the charge, he should have dismissed the complaint on this basis. As explained below, we agree with the Respondent's contention.<sup>5</sup>

### Analysis

Section 10(b) provides: "Whenever it is charged that any person has engaged in . . . any such unfair labor practice, the Board . . . shall have power to issue . . . a complaint stating the charges in that respect . . . . " It is well-settled that the "whenever it is charged" statutory language imposes a requirement that complaint allegations be "closely related" to charge allegations. See KFMB Stations, 343 NLRB 748, 748-749 (2004) and cases cited therein. This requirement reflects the principle that the Board does not have authority to take action on its own initiative, but only in response to charges filed by others. See Towne Ford Inc., 327 NLRB 193, 193, 198-199 (1998) (citing NLRB v. Fant Milling Co., 360 U.S. 301, 307-309 (1959)). The Board considers three factors in determining whether complaint allegations are closely related to charge allegations: (1) whether the allegations involve the same legal theory; (2) whether the allegations arise from the same factual circumstances or sequence of events; and (3) whether the respondent would raise similar defenses to the allegations. Redd-I, Inc., 290 NLRB 1115, 1118 (1988). If a complaint allegation is not closely related to a charge allegation, the charge does not support the complaint and the complaint allegation must be dismissed. See Towne Ford, Inc., supra at 193.

As noted above, the complaint here alleged that the Respondent violated Section 8(a)(3) by failing to apply the terms of the collective-bargaining agreement to bargaining unit employees who were not union members. However, the charge that initiated the investigation alleged that the Respondent violated Section 8(a)(3) by "retaliating against employees for engaging in union activity." Although the General Counsel and the Union contend that the complaint allegation was closely related to the charge allegation, neither excepts to the judge's finding to the contrary. In the absence of exceptions, we affirm the judge's finding regarding this issue on the merits.

The complaint—by alleging failure to apply the collective-bargaining agreement to nonmembers—alleged discrimination against nonmembers. Conversely, the charge—by alleging retaliation against employees for engaging in union activity—alleged discrimination against union supporters. Thus, as correctly explained by the judge, the complaint allegation is "the reverse" of the charge allegation.

Further, none of the three *Redd-I* factors has been met. First, the allegations rest on different legal theoriesencouraging union membership or activity (complaint) vs. discouraging union membership or activity (charge). Second, the allegations arise from different factual circumstances. Whereas the complaint arises from the Respondent's failure to provide contractual wages and benefits, the charge arises from retaliatory actions against individual employees. And third, the Respondent would assert different defenses against the allegations. It would defend the complaint by contending that the nonmembers were not its employees but rather those of a leasingcompany, and it would defend the charge by contending that the allegedly discriminatory employer actions were motivated by nondiscriminatory reasons. Accordingly, we affirm the judge's finding that the charge does not support the complaint. See Reebie Storage & Moving Co., 313 NLRB 510 (1993), enf. denied 44 F.3d 605 (7th Cir. 1995).8

Having found that the charge does not support the complaint, we also find that the judge erred in failing to dismiss the complaint on that basis.

The judge explained his failure to dismiss the complaint by stating that "although . . . the complaint allegation is not closely related to the filed charges . . . my

<sup>&</sup>lt;sup>5</sup> We accordingly do not reach either the judge's finding that the complaint is not barred by the 10(b) statute of limitations or his findings as to the merits of the complaint allegations.

<sup>&</sup>lt;sup>6</sup> See *White Electrical Construction. Co.*, 345 NLRB 1095, 1096 (2005) (where a party fails to except to a judge's finding, the party "is procedurally foreclosed from raising this issue for consideration by the Board in his answering brief").

<sup>&</sup>lt;sup>7</sup> As noted above, the Union's charge and amended charge in this Case (29–CA–28448) alleged retaliation against employees for engaging in union activity but did not allege specific retaliatory actions. However, the other charges (filed on December 5 and 12) and the consolidated complaint show allegations of many specific retaliatory actions occurring before the filing of the Union's charge or amended charge in this case, including discharge, transfers, hours reductions, denial of holiday pay, schedule changes, and break period modifications.

<sup>8</sup> In *Reebie Storage*, as here, the complaint alleged failure to apply the collective-bargaining agreement to nonmembers while the charge alleged retaliation against union members. However, the charge there also alleged refusal to provide information. The Board found that the failure-to-apply-agreement complaint allegation was closely related to the refusal-to-provide-information charge allegation and upheld the complaint on that basis. However, as relevant to this case, the Board also held that the failure-to-apply-agreement complaint allegation was not closely related to the retaliation-against-union-members charge allegation. 313 NLRB at 512. The Seventh Circuit, in denying enforcement, found that the complaint allegation was not closely related to either charge allegation. *Reebie Storage and Moving Co. v. NLRB*, supra

main finding is that Section 10(b) does not apply to this case." The "main finding" referenced by the judge is that the complaint met the 10(b) 6-month statute-oflimitations requirement. However, Section 10(b) establishes two independent requirements for complaint allegations. It establishes that complaint allegations must be closely related to charge allegations, and that unfair labor practices alleged in the complaint must have occurred less than 6 months before the charge was filed. See Machinists Local Lodge 1424 (Bryan Mfg. Co.) v. NLRB, 362 U.S. 411 (1960). If either of these requirements is not met, the complaint will be dismissed. See KFMB Stations, supra at 748-749 (complaint allegation dismissed where alleged unfair labor practice occurred less than 6 months before charge was filed but complaint allegation not closely related to charge allegations); Towne Ford, Inc., supra at 193 fn. 6, 198-199 (same); Seton Co., 332 NLRB 979, 983-984 (2000) (complaint allegation dismissed where complaint allegation closely related to charge allegations but alleged unfair labor practice occurred more than 6 months before charge was filed). 10

Here, the 10(b) requirement that the charge support the complaint continued to apply notwithstanding the judge's "main finding" that the Section 10(b) statute-of-limitations requirement was met. The judge therefore erred when, after finding that the charge did not support the complaint, he failed to dismiss the complaint on that basis.

# **ORDER**

The complaint is dismissed. Dated, Washington, D.C. April 30, 2009

Wilma B. Liebman,	Chairman
Peter C. Schaumber,	Member

# (SEAL) NATIONAL LABOR RELATIONS BOARD

Tabitha Boerschinger and Annie Hsu, Esqs., for the General Counsel.

Frank Graziadei, Esq., of New York, New York, and Alan B. Pearl, Esq., of Syosset, New York, for the Respondents. Eugene Friedman, William Anspach, and Elise Feldman, Esqs. (Friedman & Wolf, Esqs.), of New York, New York, for the Charging Party.

#### STATEMENT OF THE CASE

Steven Davis, Administrative Law Judge. Based on a charge and a first amended charge filed in Case No. 29–CA–28448 on August 15 and December 5, 2007 by Local 338, Retail, Wholesale and Department Store Union/United Food and Commercial Workers (Union), a consolidated, amended complaint was issued on January 11, 2008 against Kamal Corp., Jaber Food Corp., Coro Food Corp., Loreen Food Corp., Nadine Food Corp., Crescent Food Corp., Ziad Food Corp., 89–02 Food Corp., 75–07 Food Corp., and 130–10 Food Corp., d/b/a Trade Fair Supermarkets (Respondent, Employer or Trade Fair).

The complaint alleges that since on or about February 15, 2007, the Respondent failed to apply the terms of its collective-bargaining agreement with the Union to employees employed in the collective-bargaining unit who were not members of the Union, because they were not members of the Union, in violation of Section 8(a)(1) and (3) of the Act. The Respondent's answer and amended answers denied the material allegations of the complaint and set forth certain affirmative defenses which will be discussed below. On April 8, 10, 11, 23 and 30, 2008, I heard this case in Brooklyn, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

The Respondent, having its principal office and place of business at 30-12 30th Avenue, Astoria, New York, has been engaged in the retail distribution of products within the food industry. At all material times the Respondent has owned and operated 10 separate supermarkets in the borough of Queens, New York as set forth in the complaint, each of which is a domestic corporation, with all of them doing business as Trade Fair Supermarkets. During the past year, the Respondent derived gross revenues valued in excess of \$500,000, and purchased and received at its facilities goods and materials valued in excess of \$5,000 directly from suppliers located outside New York State. The answer admits and I find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>&</sup>lt;sup>9</sup> The statute-of-limitations requirement is expressed in the 10(b) proviso that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge

<sup>....&</sup>quot;

The General Counsel may amend a complaint to add an additional allegation where the additional alleged unfair labor practice occurred less than 6 months before a charge was filed and is closely related to the allegations in that charge. See *Redd-I*, *Inc.*, supra.

<sup>&</sup>lt;sup>1</sup> Certain other allegations of the complaint were settled and withdrawn based on settlement agreements reached after the hearing opened, and are thus not before me. Those allegations are set forth in charges filed in Case Nos. 29–CA–28552, 29–CA–28553, 29–CA–28654, 29–CA–28673, 29–CA–28686, 29–CB–13601, and certain parts of 29–CA–28448.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Background

The Union has had a collective-bargaining relationship with the Respondent for at least 20 years. Its latest contract ran from July 17, 2002 to October 4, 2006. The contract's unit description is as follows:

This agreement covers, and the term "employee" or "employees" as herein used includes, all of the Employer's present and future full-time and part-time employees (other than store managers, butchers and meat wrappers) employed in all departments in all of the present and future supermarkets and stores operated by the Employer.

The Employer recognizes the Union as the exclusive collective bargaining representative for all the Employer's employees covered by this Agreement.

About 400 workers were employed in the Respondent's supermarkets. However, only about 80 were members of the Union. The Respondent applied the contract's provisions, including the wages and benefits, only to Union members.

Until 2003, the Respondent considered all the employees employed in its stores as its own workers, and paid all of them through the ADP payroll service company.

However, in October, 2003, the Respondent entered into an agreement with Payroll Strategies, Inc. (PSI) pursuant to which PSI paid the non-union workers with checks issued by PSI. By virtue of this agreement whereby such employees were transferred to the payroll of PSI, the Respondent believed that its non-union workers became the employees of PSI and were then leased to the Respondent.

In late December, 2006, Basic Pay II (BP), which had no clients other than Trade Fair, replaced PSI, and thereafter it has paid such workers with checks issued by BP. When BP replaced PSI the employees on PSI's payroll were transferred to the BP payroll. Accordingly, the Respondent argues that those workers then became the employees of BP. There was no communication between those two companies or between the companies and the affected employees when the transfers were made. The employees affected were not fired by PSI or hired by BP. When certain employees quit when they were being transferred, BP did not reassign those workers to a different client. When employees on the payroll of BP quit, BP did not communicate with them.

These arrangements between the Respondent, PSI and BP had no effect on the Respondent's Union member-employees who continued to have their checks issued by ADP.

The General Counsel argues that PSI and BP are simply payroll service companies while the Respondent contends that it transferred its non-union employees to those companies which then leased those workers to the Respondent. It therefore argues that when the non-union employees were transferred to the payrolls of PSI and then BP, those workers ceased being the employees of the Respondent, and instead became the employees of the two companies which paid them, PSI and BP.

## B. The Employment Relationship

The nature of PSI and BP's businesses as they affect the Respondent's non-union employees, set forth below, and the reason the Respondent entered into agreements with PSI and BP are not in dispute.

The Respondent maintains the time records for the nonunion workers who work in its stores, and, utilizing payroll software provided by PSI and then BP, Trade Fair inputs the payroll information including time worked. PSI and BP send an invoice to the Respondent for the amount of wages, employment taxes, unemployment insurance, and disability insurance to be paid.<sup>2</sup> PSI and BP then process the weekly payroll and issue checks to the employees, which are distributed by the Respondent. The Respondent sends a check for the amount of money paid by the companies to PSI or BP, with an additional sum for their profit.

The non-union workers on the payroll of PSI and then BP performed the identical unit work of the employees of Trade Fair who were members of the Union. They worked under the same supervision at the same locations. The only difference was their membership in the Union.

Regarding new employees, the hiring process begins when a prospective employee visits a Trade Fair store. He completes an application which had formerly been used by Trade Fair but which is very similar to the one used by PSI and B.3 The employee is interviewed by a Trade Fair store manager. If there are no openings, the application is retained. If there is an immediate need for an employee, the Trade Fair managerinterviewer notes the new employee's wage rate, shift (parttime or full-time) on the application and signs the application. The application is then sent to BP which ensures that proper documents are included such as the I-9 form, W-4 withholding allowance certificate, a copy of the social security card, and an "acknowledgement of leased employee." BP applies the rate of pay assigned to the employee by the Trade Fair supervisor without questioning that rate. BP official John Platt stated that if all the papers were in order BP "allows" the candidate to be hired, and he is placed on the payroll. BP has never had an objection to an employee proposed by Trade Fair and has never rejected such an employee. Neither PSI nor BP interviews the prospective employee, checks references or verifies the experience claimed by the applicant.4

Regarding discharge, BP official Platt stated that he was told by the Respondent that two employees came to work drunk and were asked to leave the store. The Respondent advised BP that the two workers were no longer needed and BP sent them termination notices. BP did not conduct a separate investigation of

<sup>&</sup>lt;sup>2</sup> However, BP required that Trade Fair itself pay the workers compensation insurance.

<sup>&</sup>lt;sup>3</sup> In fact, a BP label was simply affixed over Trade Fair's name on the application.

<sup>&</sup>lt;sup>4</sup> The PSI contract states that the Client (Trade Fair) assumes full responsibility for the recruitment, selection and training of the employees, verification of their skills, and is solely responsible for their supervision, direction and control.

the incidents or challenge Trade Fair's decision to fire the two individuals.

The rate of pay and benefits, working conditions, supervision, job location and job duties of the work force, and their immediate co-workers remained unchanged during the course of their employment at Trade Fair stores, regardless of whether they were paid by checks bearing the name of ADP, PSI or BP, and regardless of whether they were members of the Union.

Trade Fair supervisors and managers have complete authority in their stores, including hiring and firing and setting work schedules for the Union and non-union workers. Requests for days off or vacations are made to Trade Fair supervisors in the stores with no involvement by PSI or BP. Neither PSI nor BP had supervisors in the Trade Fair stores.

The contract between the Respondent and PSI describes it as a "payroll services agreement and further provides that the Respondent agrees to "engage PSI to provide payrolling services." The Respondent disputes that PSI is simply a payroll service company and asserts that it and BP are leasing companies.

The contract between the Respondent and BP, executed on December 12, 2006, provides that the Respondent will lease certain "assigned" employees from BP "for the purpose of staffing and operating its stores" and that BP "shall employ certain employees (assigned employees) to perform work" at the Respondent's premises. It also provides that "the assigned employees must be transferred from their current employer to BP by completing the proper employment application documents and by transferring . . . wage and payroll information to BP"

BP official Platt described his company's services as reviewing job applications, processing payrolls, and maintaining records. The Respondent agrees to notify BP upon the termination of any assigned employee. When the contract between the Respondent and BP terminates or expires all assigned employees of BP working at the Respondent's facility "shall immediately and automatically become the sole and exclusive employees of Client or its designee." BP may notify those employees that their employment relationship with BP has been terminated. The Respondent agreed that it will supervise and train the employees, and be responsible for compliance with federal, state and city laws regarding their employment.

When BP replaced PSI, the employees were asked to sign a form entitled "acknowledgement of leased employee." It states that the worker "is an employee of BP, LLC and will look solely to BP for the payment of my wages and benefits. I further understand that I will be considered a leased employee of BP and will be working for BP at various Trade Fair Supermarkets. I further understand that I am not an employee of Trade Fair Supermarkets and am not entitled to any of the benefits that may exist for Trade Fair employees." BP also asked employees to sign an I-9 form, a W-4 form, a non-discrimination and non-sexual harassment form, and an acknowledgement of receipt of Trade-Fair's program against discrimination and sexual harassment. Employees Curtis Evans and Carlos Shimabuku refused to sign the form, Evans because he believed that

by signing it he would "erase my identity" as a Trade Fair worker

Respondent's accountant Martin Jacobson testified as to his belief that PSI and BP are leasing companies which, according to him are the employers of the non-union employees working in the Trade Fair stores. Jacobson's conclusion was based on a purely financial analysis, arguing that the workers are employees of the leasing company because such company issued its paycheck to the worker and filed payroll tax and unemployment insurance tax returns.<sup>5</sup> He noted that if Trade Fair did not forward the funds to the leasing company, that company was liable to pay the wages and taxes due. However, as noted above, Trade Fair supplied all the funds to the "leasing company" for the payment of wages, benefits and taxes.

## C. Application of the Union Contract to Union Members

### 1. The non-union employees

The only difference between the Union and non-union workers is their wages and benefits. The Union workers are covered by the Union contract and receive the wages and benefits set forth therein. The Union contract is not applied to the non-union workers. As confirmation of this, employees Evans, Jose Garcia, and Shimabuku stated that they were employed by Trade Fair for a number of years before they joined the Union. Prior to their joining they did not receive sick pay, paid holidays, health care, dental, or pension benefits. However, after they joined the Union they received those benefits.

Union agents Nelson Resto and Jeff Laub stated that when they signed employees into the Union they were not told by the Respondent that they were not Trade Fair employees or that they were employees of PSI or BP.<sup>6</sup> The Respondent owner Farid Jaber<sup>7</sup> testified that if a leased employee wanted to join the Union the Respondent had no objection to that, and that a number of workers have done so. As part of that transaction, of course, the new Union member would then be transferred onto the ADP payroll which was the payroll for the Trade Fair employees, effectively becoming a Trade Fair employee assuming that he had not been one before.

In fact, there was testimony that the Union solicited employees to join and that they joined the Union after their hire. Thus, employees Evans, Garcia and Shimabuku worked for Trade Fair for a number of years and then became members of the Union at which time the Union contract was applied to them.

The non-union workers receive the wages and benefits unilaterally determined by Trade Fair. Jaber testified that the benefits given to the non-union workers were subject to negotiation and a policy decided on between the leasing company and the Respondent. However, he was not a party to such negotiation. Martin Jacobson, the Respondent's accountant, conceded that he did not negotiate such benefits. He stated that if PSI ques-

<sup>&</sup>lt;sup>5</sup> Jacobson noted, however, that Trade Fair must make Workers Compensation payments because the State Insurance Fund required it.

<sup>&</sup>lt;sup>6</sup> Resto signed up Martin Bermudes, Curtis Evans, Veronica Gill, and Veronica Valachez.

All references to Jaber, hereafter, will be to owner Farid Jaber unless otherwise stated.

tioned the issue of sick pay or vacations, he informed PSI of Trade Fair's policy and PSI agreed to those terms. There was no listing of wages or benefits in the contracts between the Respondent and PSI or BP.

As testified by Union agents Jeff Laub and Nelson Resto and confirmed by Respondent agent Sheak Ripon, they visited the Trade Fair stores several times each month. They became aware, as early as 2004 that a substantial number of nonunion workers were employed in the stores. They informed Union president John Durso of that fact. Durso directed them to sign them into the Union. Indeed, Durso testified that during the 1998 negotiations he told Jaber that there were more non-union employees in the store than Union workers.

Resto testified that the Union attempted to examine the Respondent's payroll records of all its employees. After an arbitration begun in 2005 and a consent order settling the matter in 2007, the Union was shown the records of the Union members only, and only those from 2003 and 2004. In September, 2005 Resto asked to see the payroll records. He quoted Jaber as responding "absolutely not, I know what you are up to."

The collective-bargaining contract between the parties states that Union representatives "may visit the stores of the Employer at any time." However, Resto stated that he had difficulty speaking to Union and non-union employees in the stores, noting that each time he entered a store a manager would ask that he leave and threaten to call the police if he did not. He recalled an incident in 2006 when, while speaking to a clerk, Kamal Jaber, the brother of owner Farid Jaber, grabbed his arm and told him that he could not be in the store. Other clerks reported to Resto that they could not speak to him because they feared being fired. Resto also testified that managers followed him and cursed and screamed at him when he visited a store. At times he was able to speak to Union members but not nonunion workers because they were afraid to speak to him. Union agent Jeff Laub had similar experiences in the period 2004 to 2007.

In an attempt to enroll the non-union workers, Resto organized a group of Union agents to enter all 10 stores on the same day. At one store, Abraham Jaber, the father of owner Farid Jaber screamed and cursed at him, demanding that he leave the store or he would call the police.

John Durso, the Union's president, served as the business agent for the Trade Fair stores from about 1997 to 1995. He stated that he was aware, from at least 1986, that a number of employees working in Trade Fair stores were not Union members. He further stated that between 2002 and 2006, he was told by his agents that there was a "problem" with the stores and that employees were receiving "dual paychecks" and they were trying to "get to the bottom of it."

## 2. The contract negotiation sessions

Jaber stated that during the 1995 and 2002 negotiations, he and Durso spoke about the fact that there were employees working in the Respondent's stores who were not members of the Union. However, Jaber said that Durso had "no issue" and "no objection" to the nonmembership of such employees. Jaber said that Durso understood that this was a "family business" and that the Respondent was "trying to survive."

Jaber testified that in the summer of 2002, during the negotiation of the 2002 contract, Durso told him that a union audit would take place involving all companies under contract with the Union, and that he (Durso) did "not want to see any non-union" workers on the company payroll. Rather, he only wanted to see Union members on the payroll.

Jaber stated that he then discussed the matter with company accountant Martin Jacobson who proposed putting the non-union workers into a leasing company. Jaber testified that he told Durso that the company would "look around" for a leasing company and put the non-union workers into such a company so that they would no longer be employees of Trade Fair. According to Jaber, Durso did not object, but said "do what you have to do."

Jacobson was not a party to these discussions but was told by Jaber that Durso was concerned that the audit would establish that all employees on the Trade Fair payroll "would be entitled to certain benefits," and that Durso urged that Jaber "really should find a way to get them off the Trade Fair payroll."

Jaber testified that one of the main reasons for the decision to lease employees was that it was easier for the Respondent's operation—it did not need to maintain a large payroll staff to process the salaries of the non-union workers, and that it was necessary for the Respondent "to survive." He conceded that "officially" he did not notify Durso of his intent to lease employees from PSI.

Jacobson testified that it took him about four to five months to find a leasing company, and then negotiations took place with it. Jacobson did not recommend that the Union be informed of the leasing agreement because it had nonmembers working for it for many years.

There is no date on the signature page of the PSI contract, but Jaber testified that it was signed in July, 2003. However, its effective date is October 12, 2003. Jaber stated that although the Union contract was being negotiated at that time he did not ask that his leasing of employees be included therein. His view was that the Union contract did not prohibit the leasing of employees so he believed that he could do so. However, during the 2006 negotiations Jaber asked for the inclusion of a clause permitting the leasing of workers.

Jaber testified that after the PSI contract was executed, he and Jacobson told Union agent Resto that the non-union employees were transferred to a leasing company. Resto denied being told by the Respondent that workers at the Trade Fair stores were on the PSI payroll or that they were leased. The first PSI payroll was issued in the last week of December, 2003.

Durso testified that during the 1998 contract negotiations he mentioned to Jaber that there were more employees in Trade Fair stores than were Union members. According to Durso, that matter was discussed between them "every day"—"every day it was a fight." Jaber told him that there was constant turnover and the employees were new hires who were still in their probationary period and not yet eligible for Union membership. Durso stated that he told Jaber that the non-union workers had to be signed into the Union, but that Union agents could not

<sup>&</sup>lt;sup>8</sup> The contract provides for a 30-day probationary period for full-time workers and 90 days for part-time employees.

find them and that the Union was being denied access to payroll records. Jaber replied that the workers were only temporary, that he could not "hold onto" workers. In contrast, Jaber testified that Durso never objected to the fact that there were non-union employees working in the Trade Fair stores.

Union agent Resto stated that he was not present at the negotiation of the 2002 collective-bargaining agreement, but he was in attendance at the contract signing in July or August, 2002. He stated that the subject of leasing employees was not mentioned. Similarly, agent Laub stated that he was never told by the Respondent that it was using leased employees.

Durso negotiated the 2002 contract with Jaber, and concedes that he was told at that time by Jaber that there were workers who were not members of the Union. Indeed, as set forth above, Durso admits that in 1998 he mentioned to Jaber that the stores employed more non-union workers than Union members. Durso admits telling Jaber that there was going to be a Union audit of all Trade Fair stores, but denies telling him at that time that he had to get the non-union workers off the Trade Fair payroll. Durso stated that, at the same time, he told his agents to ensure that all unit employees were signed into the Union. Durso denied being told at any time by Jaber that he intended to place the non-union workers in a leasing company. Durso stated that he first heard or discovered the name PSI during the course of the audit, and during the 2006 contract negotiations.9 Durso told Jaber that he "could not do that" since they "belong to the Union."

During the 2006 contract talks, the Respondent made a written proposal that "the Union agrees that the Employer may continue to utilize leased workers consistent with past practice." Durso replied "Out—No It cannot conflict with contract." Jaber stated that he wanted that clause in the contract because of the Union's Trust Fund lawsuit concerning the leased employees. In contrast, Jacobson testified that the leasing arrangement should be "memorialized" even though the Union was aware of it for many years.

There was no evidence that the Union filed any grievance, arbitration or charge from 1998 to 2002 alleging that the Respondent had employees who were not members of the Union. However, the Union's Trust Funds sued the Respondent concerning pension funds due for the "leased" employees.

#### Analysis and Discussion

The complaint alleges that since on or about February 15, 2007, the Respondent failed to apply the terms of its collective-bargaining agreement to employees employed in the collective-bargaining unit who were not members of the Union, in violation of Section 8(a)(1) and (3) of the Act.

The Respondent asserts the following defenses. It first argues that the workers in its stores who were not Union members were not its employees, but rather were employees of a leasing company. Second, it argues that the complaint is barred by Section 10(b) of the Act because (a) the Union was on notice

that large numbers of workers were not members of the Union and (b) the complaint allegation was not supported by a proper charge.

#### I. THE "LEASED" EMPLOYEES

The Respondent's amended answer asserts that the collective-bargaining agreement did not "preclude or prohibit" it from subcontracting work from other companies or from hiring or employing such companies to provide services for Respondent's supermarkets. That may be true, but the evidence supports a finding that the Respondent's employees were not leased or subcontracted, but in fact remained the employees of the Respondent at all times.

The Respondent contends that the non-union employees working at Trade Fair stores are the employees of the leasing companies, first PSI, and then BP. The only evidence of such status is the testimony of accountant Jacobson. He testified, without supporting legal or tax authority, that simply because the workers are on the payroll of the so-called leasing companies and those companies make various tax payments on the employees' behalf, they are the employees of the leasing companies.

Such an argument has no basis in the Act. The employees at issue were and are at all times unquestionably the employees of Trade Fair.

As set forth above, on a weekly basis Trade Fair sends the names, wages and payroll information of its non-union employees to PSI and then to its successor BP. Those companies then sent Trade Fair an invoice for the amount of money payable to the workers. Trade Fair then sends a check to the "leasing company" which then issues checks to the employees with the name PSI or later, BP on the check. Thus, Trade Fair completely funded the employees' payments. The "leasing company" acted only as a conduit for the payments.

As set forth above, new employees are interviewed and hired by Trade Fair. Their applications are simply sent to the PSI or BP for processing and to put them on the payroll of those companies. Employees were discharged by Trade Fair with no investigation being made into the matter by the two companies.

The terms and conditions of employment are set by Trade Fair with no input from PSI or BP. There was no negotiation between those companies and the Respondent concerning the employees' benefits as implied by Jaber. Rather, Jacobson told the companies what Trade Fair had given them and the companies acquiesced. It did not matter what PSI or BP agreed to in that respect since the benefits were funded by Trade Fair anyway

Supervision of the workers was made solely by Trade Fair managers and supervisors who had daily contact with the employees, gave them their assignments and administered discipline. No PSI or BP supervisor was stationed in any of the stores. Requests for sick days, vacations and other forms of time off were made solely to Trade Fair managers.

Notwithstanding the movement of the employees' names from Trade Fair's ADP payroll to PSI and then to BP, or sometimes back to ADP if they joined the Union, the workers were treated as if they remained the employees of Trade Fair. There was no communication between the ostensible "new employer"

<sup>&</sup>lt;sup>9</sup> There was much testimony concerning Durso's deposition given during a federal court proceeding regarding whether he was told, in 2002, that the Respondent was using PSI. However, the deposition was not clear on this point and I do not rely on the deposition in making my findings herein.

and the worker as to his new boss. Their pay and benefits, job locations, duties, and immediate co-workers remained the same.

The contract between the Respondent and PSI correctly describes their relationship as a "payroll services agreement" in which the Respondent engaged PSI to provide "payrolling services." The contract between the Respondent and BP, however, states that BP is the employer of the "assigned" employees and provides for the "transfer" of such workers from Trade Fair to BP. Such a transfer was effected, according to the contract, simply by the submission of an employment application, the transfer of wage and payroll information to BP, and the execution of the "acknowledgement of leased employee form." This "paper transfer," however, cannot change the true employer of the employees, nor does it change the circumstances of their work. The fact that the contract states that when it expires, the "assigned" employees immediately and automatically become the employees of Trade Fair is significant in that if they were truly the employees of BP, upon expiration of the contract that company would have laid them off, discharged them or transferred them to other locations.

It is significant that when a BP employee joined the Union, the Respondent transferred that worker from the BP payroll and placed him on Trade Fair's payroll. BP had no involvement in the removal of "its" employee from its payroll to Trade Fair's. This shows that the employee at all times was an employee of the Respondent which had the power to remove the worker from BP's payroll and place him on the Respondent's.

BP official Platt correctly stated that his company reviews job applications, processes payrolls and maintains records. His statement that he "allows" employees to be hired by the Respondent if all their documentation is in order is nothing more than a payroll service company would do and is consistent with his characterization of his company as one which reviews applications. The "acknowledgement" form in which the employee declares that he is an employee of BP and not of Trade Fair is completely self-serving and cannot change the true fact that the employees were at all times employees of Trade Fair. Employee Evans refused to sign it because he recognized it for what it was – a document which he believed would "erase my identity in the company, because I've been there a long time. And I know I'm not a leased employee. I work for Trade Fair."

The Board considered a virtually identical arrangement in *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1122, 1136 (2002). In that case the Board rejected an argument that PSI was a joint employer with the respondent, finding that the respondent, as here, hired the workers, determined their work hours and rates of pay, assigned them work, administered discipline, and reimbursed PSI for the costs of the employees' compensation. It further found that PSI handled "solely administrative matters, such as payroll." In that case the Board reached this conclusion notwithstanding that, as here, the workers were told that they were the employees of PSI, their applications bore PSI's name, and paychecks and W-2 statements were issued on a PSI bank account. *Dilling Mechanical*. 338 NLRB 902, 904 (2003).

The Respondent argues that the contract is ambiguous. It contends that the use of the word "employee" does not cover all the employees employed in its stores. The Respondent further

maintains that inasmuch as the contract does not prohibit leasing or subcontracting, the term "employee" only covered the employees of the Respondent, not those of PSI or BP.

I disagree. The contract is quite clear. It expressly covers "all the Employer's . . . employees in all departments" except butchers and meat wrappers, and, as in *Schorr Stern Food Corp.*, 227 NLRB 1650 (1977), the Respondent expressly "recognizes the Union as the exclusive collective bargaining representative for all the Employer's employees covered by this Agreement." Accordingly, I reject the Respondent's argument that evidence may be accepted to vary the terms of the agreement. Even if such evidence was considered, no valid proof has been adduced that a leasing of employees took place or that these employees were the employees of any company other than the Respondent.

I therefore conclude that the Respondent's employees at all times remained its employees and at no time became the employees of PSI or BP. Having made this finding, I cannot find that the Union was aware of a "practice" of leasing employees when no valid lease arrangement was made. In addition, I note that the Union took no action inconsistent with its belief that the employees working in the Respondent's stores were employees of Trade Fair, while at the same time the Employer made no credible claim at any appropriate time in its relations with the Union that these people were not its employees. Further, the Union could not have waived any right to protest their being "leased" by inaction in protesting such status where their status as employees of Trade Fair remained unchanged.

I also reject the Respondent's additional argument that it was its "past practice" since 2002 to "subcontract labor" and that alleged practice was "open and notorious and known to the Union." The Respondent contends that Section 10(b) of the Act precludes the finding of an unfair labor practice as to such conduct, and further that the "Board is without authority to alter, amend or modify the terms and conditions in effect between" the parties.

As I have found above, there has been no valid subcontracting or leasing of employees. The unit employees of Trade Fair remained the employees of Trade Fair and no other company. Accordingly, the Respondent had no past practice to subcontract or lease workers.

# II. THE FAILURE TO APPLY THE CONTRACT TO THE RESPONDENT'S EMPLOYEES

There is no dispute that the Union's contract with the Respondent has been applied only to employees who are members of the Union. Thus, employees who are Union members receive the wages and benefits set forth in the contract. The Respondent does not provide contractual wages and benefits to its employees who are not members of the Union. They receive different wages and lesser benefits although they are in the bargaining unit, perform unit work and are covered by the collective-bargaining contract.

The Respondent concedes that it did not apply the terms of its contract to certain employees but asserts that those workers were not its employees. As set forth above, I have found that the "leased" employees were at all times the employees of the

Respondent who were employed in the unit covered by the collective-bargaining agreement.

I therefore find that the Respondent did not apply the contract to those of its employees who it treated as "leased." The reason the contract was not applied to those workers is that they were not members of the Union. This is proven by the fact that when certain "leased" employees became members of the Union, such as Evans, Garcia and Shimabuku, the contract's terms were applied to them.

Where employees are in the bargaining unit, perform unit work and are covered by the collective-bargaining agreement, the Respondent is obligated to apply the contract terms to them. *Kaufman DeDell Printing, Inc.*, 251 NLRB 79–80 (1980). The failure to apply the contract to all members of the unit violates Section 8(a)(3) of the Act. *Vanguard Tours*, 300 NRLB 250, 266 (1990).

"The policy of the Act is to insulate employees' jobs from their organizational rights." *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954). "[T]he union being exclusive bargaining agent for both member and nonmember employees, the employer could not, without violating Section 8(a)(3), discriminate in wages solely on the basis of such membership even though it had executed a contract with the union prescribing such action." 347 U.S. at 47. An employer violates Section 8(a)(3) of the Act when it discriminates in the wages and benefits received by employees solely on the basis of union membership because such a practice encourages union membership by means of discrimination. *Radio Officers' Union* at 47; *Rockaway News Supply Co., Inc.*, 94 NLRB 1056, 1059 (1951).

Schorr Stern Food Corp., 227 NLRB 1650 (1977), involving similar facts to this case, is controlling here. In that case, the parties had a contract which covered "all" the employer's unit employees, however it was applied only to those workers who were members of the union. The employer there made many of the same arguments the Respondent makes here. In Schorr, the respondent offered parol evidence in the form of testimony that "from the start" the union was recognized by it as the representative of its members only and not for all its unit employees, and that the union-shop provision was not enforced.

The Board first decided that the union-shop provision *was* enforced, citing a worker who joined the union. Here, too, the union-shop provision was enforced with regard to those 80 employees who the Respondent concedes are its own and also as to others, such as Evans, Garcia and Shimabuku who were "employees" of PSI and BP and then joined the Union. In addition, Union agents were directed by Union officials to sign up all the unit employees. Accordingly, they regularly and actively sought to speak to non-union workers employed in the stores and engaged in an organizing effort encompassing all 10 stores. Further, the Union sought payroll information in order to learn the number and identities of the non-union workers.

The employer in *Schorr* also argued, as here, that the union never sought wage increases for employees other than its own members, and that it dealt with the union only with respect to those employees who were union members. The Board, citing *Prestige Bedding, Inc.*, 212 NLRB 690, 700 (1974), rejected parol evidence which sought to explain the terms of the contract where the contract was not ambiguous. *Quality Building* 

Contractors, 342 NLRB 429, 430 (2004); F & C Transfer Co., 277 NLRB 591, 596 (1985). The Board noted that evidence of a "members only" practice is relevant only in representation and refusal to bargain cases, and cannot "shield a party from liability for unlawful conduct occurring thereunder." 227 at 1654.

This case is stronger than *Schorr* because in *Schorr* the employer originally recognized and bargained with the union on a "members only" basis. Here, no such practice was undertaken. The contract covering all employees was entered into long before any "leasing" of employees occurred.

Here, the non-union employees are in the bargaining unit, perform unit work and are covered by the collective-bargaining agreement. Accordingly I find that, consistent with the terms of the contract, the Respondent recognized the Union as the sole collective-bargaining representative of all its employees in the above-described unit and is legally bound to apply all the terms and conditions of that contract equally to all unit employees, including those whom it improperly contends are "leased" employees.

## III. THE RESPONDENT'S DEFENSES

The Respondent argues that the Union has waived any right to consider the non-union employees as part of the unit since the Union was aware of its "practice" of leasing employees since 2002, and also that the Union was aware or should have been aware of the large number of employees working in its stores but did nothing to organize them. Accordingly, it argues that Section 10(b) of the Act precludes a finding of any violation by the Respondent. The Respondent further contends that the complaint allegation is not supported by a proper charge and therefore should be barred by Section 10(b).

#### A. The Section 10(b) Defense

# 1. Section 10(b) does not apply because of the continuing nature of the violation

Section 10(b) of the Act provides that "no complaint shall be issued based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

A threshold question is the applicability of Section 10(b) to this case. In *Farmingdale Iron Works*, 249 NLRB 98 (1980), enfd. mem. 661 F.2d 910 (2nd Cir. 1981), the Board held that each failure during the term of an existing collective-bargaining agreement to pay contractually required periodic benefit fund payments within the 10(b) period constitutes a separate and distinct violation of Section 8(a)(1) and (5) of the Act.

The Board distinguishes between a "simple failure to abide by the terms of a collective-bargaining agreement," or "material breach violation," on the one hand, and an "outright repudiation of the agreement itself," or "total repudiation" on the other. *Vallow Floor Coverings*, Inc., 335 NLRB 20, 20 (2001), citing *A&L Underground*, 302 NLRB 467, 469 (1991).

Here, the Respondent did not unequivocally repudiate its obligation to abide by the contract since it made payments on behalf of its workers who were Union members. See *Chemung Contracting Corp.*, 291 NLRB 773, 774 (1988).

When an employer has not rejected a collective-bargaining agreement in its entirety, but has instead failed to apply certain

of its terms to unit employees, this represents a beach of the contract's terms and each successive breach constitutes a separate and distinct unfair labor practice. Thus, even when a union has clear and unequivocal notice outside the Section 10(b) period that the respondent is failing to observe the terms of the contract, the complaint is not time-barred. Instead the 10(b) period serves only as a limitation on the remedy to the six months prior to the filing of the charge. *Farmingdale Iron Works*, 249 NLRB 98–99 (1980), enfd. mem. 661 F.2d 910 (2d Cir. 1981).

I find that just as each failure to pay fund benefits constitutes a new violation of Section 8(a)(5), it logically follows that each failure during the term of the agreement to apply the contract to employees also constitutes a separate and distinct violation of Section 8(a)(3) of the Act. The same action by the employer, its failure to apply the contract to employees, constitutes the violation of the Act. This is unlike the case of a discharge of an employee where the date of the termination triggers the running of the six month 10(b) period. Rather, each failure to apply the contract to the unit employees constitutes a new violation.

Accordingly, I find that a separate and distinct violation of Section 8(a)(3) occurred without reference to Section 10(b) each time the Respondent failed to apply the contract to its non-union employees. Farmingdale Iron Works. Thus, each failure to apply the contract terms to employees begins a new limitations period and a charge is timely filed with respect to each such failure without regard to earlier failures to apply the contract terms

Inasmuch as the charge was filed on August 15, 2007, within six months of the October 6, 2006 expiration of the contract, the charge was timely filed. In *Schorr*, the unlawful members-only provisions were still being effectuated and enforced at the time the charge was filed. Similarly, here, at the time the instant charge was filed, the Respondent continued to effectuate and enforce its unlawful failure to apply the terms of its contract to its employees who were not members of the Union. 227 NLRB at 1654.

Further, it is unnecessary to consider when, if ever, the union had clear and unequivocal notice that the employer had not applied the contract to non-union employees where each such failure constituted a new violation of the Act. *King Manor Care Center*, 308 NLRB 884 (1992),

### 2. Alternative finding if Section 10(b) applies

However, in the event that it is determined that Section 10(b) applies, I will discuss the issue of whether the Union had notice of the Respondent's violation within the 10(b) period.

The Board has jurisdiction over a matter when a charge is filed. Section 10(b) serves as a statute of limitations by limiting the subject of complaints to conduct about which a charge was filed within six months of the violation. The Board has consistently held that the 10(b) period does not commence until the charging party has "clear and unequivocal notice of the violation of the Act." The Respondent has the burden of showing that the charging party had such notice. A & L Underground, 302 NLRB 467, 469 (1991).

In *Moeller Bros. Body Shop*, 306 NLRB 191, 193 (1992), the Board stated that "while a union is not required to police its

contracts aggressively in order to meet the reasonable diligence standard, it cannot with impunity ignore an employer or a unit . . . and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer's unilateral changes."

The Respondent argues that the Union knew or should have known that it was not applying the contract to a large number of people working in the stores. First, it cites the testimony of Jaber that Union official Durso advised him that an audit would be undertaken of the company's books and he did not want to see any leased employees on the payroll. The Respondent asserts that Durso encouraged Trade Fair to hide its employees by means of a leasing arrangement. I cannot credit such testimony. There was uncontroverted evidence that Durso directed his agents to sign into the Union all employees who were not Union members. Clearly, if he acquiesced to Jaber's plan to hide many of the workers he would not have given such an order. In fact, the Union diligently visited the ten stores regularly, attempted to speak to workers, distributed literature and organized a simultaneous mass organizing effort at the ten stores. In fact, it succeeded in signing up at least three employees, Evans, Garcia and Shimabuku. Such an effort is clearly inconsistent with Durso's alleged direction that Jaber remove a large number of employees from Trade Fair's payroll.

Similarly, I cannot credit Jaber's testimony that he told the Union's agents that Trade Fair was leasing employees. If that was the case, the Union would not have expended its time and effort in attempting to organize the employees in the store who it allegedly believed were leased.

Even if Jaber told the Union agents about its "leasing" arrangement, the fact that the employees were not in fact leased but remained Trade Fair's workers renders such a declaration irrelevant. If, for example, the Union's agents had been told that such workers were statutory supervisors or independent contractors when they did not have such status, that assertion had no legal effect. Thus, even if Durso was told that the vast majority of employees were leased workers such an announcement had no legal effect since they were not, in fact, leased, but rather remained Trade Fair's employees.

Apparently, Durso and the Union were aware that the contract was not being applied to large numbers of workers. Thus, Durso concedes being so aware and in fact he told his agents to sign them up. 10 However, there was apparently some confusion as to what he believed, or was led to believe regarding the nature of those workers.

The Board has held that where a "delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct," a finding of clear and unequivocal notice is unwarranted. A& L Underground, 302 NLRB 467, 469 (1991). I find that the Respondent engaged in ambiguous conduct by acquiescing in the Union's signing up of certain workers who were purportedly "leased" employees. Such conduct created conflicting signals that although the Respondent maintained that the workers were leased and not its employees, once they became Union mem-

<sup>&</sup>lt;sup>10</sup> Why it was necessary to sign employees into the Union when they were already covered by the contract is a question that has not been answered here.

bers the Respondent placed them on its payroll. In addition, Durso credibly testified that he was told that the workers were probationary employees and a letter to the Union funds stated that many employees working in the stores were part of the meat department which is not covered by the contract. When attempting to learn the true circumstances of the nature of the workers' employment by visiting the stores, the Respondent's managers interfered with Union agents' efforts to speak to the workers. Accordingly, although the Union may have possessed knowledge of possibly unlawful acts, the Respondent has not shown that it had "clear and unequivocal notice" of such unlawful actions.

The running of the limitation period may also be tolled by acts of fraudulent concealment on the part of the perpetrator of the alleged unfair labor conduct, In *Browne & Sharpe Mfg. Co.*, 321 NLRB 924 (1996), the Board stated that it considers the following elements in deciding whether to toll the limitations period for this reason (a) deliberate concealment has occurred (b) material facts were the object of the concealment and (c) the injured party was ignorant of those facts without any fault or want of due diligence on its part.

Fraudulent concealment requires affirmative misstatements about material facts. *Avne Systems, Inc.*, 331 NLRB 1352, 1353 (2000). A finding could reasonably be made that the Respondent engaged in the fraudulent concealment of material facts. It sought to hide its employees in a leasing company and make it appear that they were no longer its workers. I have found, above, that Union official Durso did not ask or encourage the Respondent to make such an arrangement. The Respondent made a material misstatement to Durso about the nature of the "leased" employees, calling them leased when no valid claim could have been made that they were, in fact, leased. In doing so, the Respondent attempted to conceal their actual employment by it from the Union and instead deliberately concealed the true facts from the Union.

Durso testified that it was difficult for its agents to get into the stores and that having the Respondent honor its obligation to apply the contract was always a "fight." Accordingly, it appears that the Union attempted to make reasonably diligent efforts to learn the facts by interviewing the employees. The Union apparently sought to learn whether they were indeed probationary workers or meat department employees, both categories being excluded from the coverage of the contract. The Union's agents' frequent visits to the stores were met with hostility by the Respondent's managers.

Based on the totality of the evidence, I cannot find that the Union had "clear and unequivocal notice" that the Respondent had failed to apply the contract to its non-union unit workforce. *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). As set forth above, it is the Respondent's burden that the Union had such notice. I cannot find that it has met that burden.

I further find that the Respondent engaged in fraudulent concealment of material facts concerning the true employer of the non-union workers. Such fraudulent concealment tolls the Section 10(b) period.

#### 3. The Relationship of the Charge to the Complaint

In deciding whether an allegation in a charge provides a sufficient basis for a complaint allegation, the Board examines whether the allegations that are asserted to be barred by Section 10(b) are "closely related" to the allegations of a timely filed charge. In applying this test, the Board considers whether the (a) allegations involve the same legal theory (b) allegations arise from the same factual circumstances or sequence of events and (c) respondent would raise similar defenses to both allegations. *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); *Redd-I, Inc.*, 290 NLRB 1115 (1988).

In *Redd-I*, 290 NLRB at 1116, the Board stated that it would apply the traditional "closely related" test without regard to whether another charge encompassing the untimely allegations has been withdrawn or dismissed."

The original charge, filed on August 15, 2007, alleged that the Respondent violated Section 8(a)(1)(3) and (5) of the Act by:

Retaliating against employees for engaging in union activity, and by failing to maintain the terms and conditions of employment upon expiration of the collective bargaining agreement between [it and the Union]

The allegations concerning Section 8(a)(5) were settled and withdrawn after the hearing opened. The amended charge, filed on December 6, 2007, alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by retaliating against employees for engaging in union activity.

The complaint, issued on January 11, 2008, alleges that since on or about February 15, 2007, the Respondent failed to apply the terms of its collective-bargaining agreement with the Union to employees employed in the collective-bargaining unit who were not members of the Union because they were not members of the Union, in violation of Section 8(a)(1) and (3) of the Act.

Clearly, no charge was filed expressly alleging the complaint allegation at issue here. The question is whether the filed charges are closely related to the complaint allegation—is there a sufficient connection between them to find that the complaint allegation is properly supported by a charge.

The charges both allege that the Respondent retaliated against employees for engaging in union activity. The charges apparently refer to alleged discrimination against employees who were Union members or active in behalf of the Union whereas the complaint alleges the reverse—that employees were discriminated against (the contract was not applied to them) because they were not union members and had not engaged in union activity.

The General Counsel asserts that, broadly speaking, the charges and the complaint allege the same theory of violation—that adverse actions were taken against employees by virtue of their union membership in violation of Section 8(a)(3) of the Act. However, I cannot find that any of the bases set forth under the above authorities has been met. I cannot find that the allegations in either of the charges is closely related to the complaint's allegation. They involve different theories. The charges assert that employees were discriminated against for engaging in union activities. On the other hand, the complaint

alleges that the Respondent failed to apply the contract terms to non-union employees, thereby rewarding union membership or activities.

Nor can it be said that allegations arise from the same factual circumstances or sequence of events. The charges relate to discrimination against employees and the complaint relates to a failure to apply the contract terms. Similarly, I cannot find that the Respondent would have raised similar defenses to the allegations set forth in the charges and complaint since they stand on different theories. *Precision Concrete v. NLRB*, 334 F.3d 88 (D.C. Cir. 2003).

Although I find herein that the complaint allegation is not closely related to the filed charges, inasmuch as my main finding is that Section 10(b) does not apply to this case, I reject the Respondent's 10(b) defenses.

#### CONCLUSIONS OF LAW

By failing to apply the terms of the collective-bargaining agreement which was effective from July 17, 2002 through October 4, 2006 to its employees in the collective-bargaining unit who were not members of Local 338, Retail, Wholesale and Department Store Union/United Food and Commercial Workers, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The complaint alleges and I find that the Respondent failed to apply the terms of the July 17, 2002 to October 4, 2006 collective-bargaining agreement to employees employed in the unit who were not members of the Union. Based on the above findings it is clear that all of the Respondent's employees who were not members of the Union who are or have been employed in the collective-bargaining unit at any time from February 15, 2007, have suffered identical discriminatory treatment.

Accordingly, the proper remedy is, and I recommend that the Respondent shall make whole all past and present unit employees who were not members of the Union who were employed by the Respondent during the period from February 15, 2007, for any loss of pay or other benefits they may have suffered by reason of the Respondent's failure to apply the terms and conditions of the collective-bargaining agreement to them in the same manner as it did to its employees who were members of the Union. The Respondent shall make whole all past and present employees who were employed by the Respondent in work classifications covered by the collective-bargaining unit but who were not members of the Union during the period since February 15, 2007, the date six months prior to the filing and service of the charge herein which begins the period cognizable under Section 10(b) of the Act. Schorr Stern, 227 NLRB at 1655. All of the Respondent's unit employees shall be included in this make whole order, including those who the Respondent improperly called "leased" or "subcontracted."

The employees shall be made whole for any loss of earnings and other benefits, computed on a quarterly basis from February 15, 2007 to the present, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*. 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

#### ORDER

The Respondent, Kamal Corp., Jaber Food Corp., Coro Food Corp., Loreen Food Corp., Nadine Food Corp., Crescent Food Corp., Ziad Food Corp., 89-02 Food Corp., 75-07 Food Corp., and 130-10 Food Corp., d/b/a Trade Fair Supermarkets, Queens, New York, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing to apply the terms of its collective-bargaining agreement which was effective from July 17, 2002 through October 4, 2006 to its employees in the collective-bargaining unit who were not members of Local 338, Retail, Wholesale and Department Store Union/United Food and Commercial Workers.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Make whole all of its past and present unit employees who were not members of the Union who were employed by it during the period from February 15, 2007 to the present for any loss of pay or other benefits they may have suffered by reason of its failure to apply the terms and conditions of the collective-bargaining agreement to them in the same manner as it did to its employees who were members of the Union.
- (b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (c) Within 14 days after service by the Region, post at its ten supermarkets in Queens, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive

<sup>&</sup>lt;sup>11</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>&</sup>lt;sup>12</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 15, 2007.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 23, 2008

#### **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT fail to apply the terms of our collective-bargaining agreement which was effective from July 17, 2002 through October 4, 2006 to our employees in the collective-bargaining unit who were not members of Local 338, Retail, Wholesale and Department Store Union/United Food and Commercial Workers.

WE WILL not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole all of our past and present unit employees who were not members of the Union who were employed by us during the period from February 15, 2007 to the present for any loss of pay or other benefits they may have suffered by reason of our failure to apply the terms and conditions of the collective-bargaining agreement to them in the same manner as we did to our employees who were members of the Union.

WE WILL preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

KAMAL CORP., JABER FOOD CORP., CORO FOOD CORP., LOREEN FOOD CORP., NADINE FOOD CORP., CRESCENT FOOD CORP., ZIAD FOOD CORP., 89-02 FOOD CORP., 75-07 FOOD CORP., AND 130-10 FOOD CORP., D/B/A TRADE FAIR SUPERMARKETS